IN THE HIGH COURT OF JUDICATURE
AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.689 OF 2002

1. Sampat Ramu Patole, age 30 years.
2. Balu Ramu Patole, age 21 years. ...
Appellants
Both Resident of Dharampur,
Tal: Malshiras, Dist: Solapur.
At present in Yerwada Central Pune, Pune.

Vs.

The State of Maharashtra ...
Respondents

Mr. R.V.Bansode Advocate for the Appellants
Mr. K.V.Saste, A.P.P for the State

CORAM: SHRI D.G.DESHPANDE &
SMT. ROSHAN DALVI, JJ.
DATED: 1ST DECEMBER, 2006

JUDGMENT (PER SMT. ROSHAN DALVI, J.)

1. The Appellants, who are brothers, have been charged, convicted and sentenced for the offence of committing murder of one Fulabai Ragunath Masughade on 30th September, 1990 with common intention punishable under Section 302 r.w. S.34 of the IPC.

2. The Appellants/accused are also charged , convicted and sentenced for having committed offence of voluntarily causing hurt to family members of her

family being Mohan Gulab Masughade, Balubai Gulab Masughade, and Anusuyabai Gulab Masughade by means of deadly weapons and with common intention punishable under Section 324 r.w. S. 34 of IPC.

3. The offence is stated to be the culmination for indicting the accused for having stolen a bicycle of the father-in-law of the deceased victim.

4. The prosecution case is that a bicycle of one Gulab, father-in-law of the victim was stolen. He voiced grievance indicting the accused for committing the theft. The next day the bicycle was found in field of one Murlidhar Patil. The accused took offence to the grievance made wrongly indicting them of the theft, and hence wanted to take Gulab, the father-in-law of the deceased/victim and Mohan his son to task.

5. Accordingly on 30th September, 1990 between 9.00 to 9.30 p.m. Appellant/accused no.1 came to the house of Gulab armed with an axe along with his brother Appellant/accused no.2 who was armed with a stick and were moving nearby. They also met the Sarpanch of the village and expressed their displeasure indicting them of the theft. The Sarpanch attempted to pacify them, but the appellants/accused remained there to

approach Gulab. Because both the accused were moving near the house, Gulab and his wife Anusuya wanted to go to the house of the Sarpanch to inform him about the incident. They were intercepted by the accused on the way resulting in an altercation. The Appellant No.2 gave stick blows to one Mohan the nephew of Gulab and Anusuya. Appellant No.1 wanted to assault Gulab by means of his axe. Gulab's daughter-in-law Fulabai intervened. The Appellant No.1 dealt an axe blow on her back causing her to fall down. Thereafter he dealt another axe blow on her back. That axe blow rooted in her back. Both the accused dragged Fulabai with the help of the rooted axe towards the electric pole.

6. People gathered due to the commotion. The Sarpanch came upon the scene and abused the accused. The accused escaped. They were not found in their house and were arrested later. Fulabai was initially taken to a Doctor in the local Primary Health Center one Dr. More, who took out the axe rooted in her back and informed the police. Doctor examined the victim who told him that Appellant no.1 had assaulted her by means of an axe. The police arrived and recorded her statement in the presence of the said Doctor, which was treated as the FIR. Initial FIR was

for offence under Section 307, 323, 504 r.w. 34 of IPC. In her statement to the police also Fulabai stated about the Appellant No.1 having assaulted her with the axe, SEM was called, who also recorded her statement in the presence of the said Doctor after obtaining the endorsement of the Doctor on its copy certifying that the victim was conscious and in a position to make the statement. Thereafter the injured was referred to Civil Hospital, Solapur. She expired on 1st October, 1990 on the way to the hospital. Thereafter the charge was altered to one under Section 302 of the Indian Penal Code instead of Sections 307, 504 of IPC. An inquest panchanama was drawn and the PM report was obtained.

7. The other injured persons were taken to the Primary Health Center of that village and treated at 10.00 p.m. On 30th September, 1990. Their medical certificates were obtained.

8. This case necessarily rests upon the direct oral evidence of several persons, being the family members of Gulab who were also injured witnesses in the incident together with the recovery of the axe and corroborated by the Medical evidence and the inquest panchanama.

9. Several witnesses have been examined by the prosecution, Several of whom have turned hostile. It may at once be mentioned that the very nature of the crime reflects the fear and intimidation that would be caused to the witnesses who would depose about it. However, erroneously, the indictment was made, the appellants sought to take revenge which clearly exceeded the initial offence which they could take for such indictment. No murder of a man, or any one else who might intervene, could be commensurate with any wrongful indictment of an offence like the theft of bicycle. This was despite and after the Sarpanch trying to mollify the accused. The accused would have none of it. They carried deadly weapons which also were far in excess of what could be expected by way of a counter blast to a wrongful indictment. The evidence of P.W.1,2,3, 5 and 7 who turned hostile is therefore, required to be appreciated upon such a scenario. The persons who would not stop short of taking a life for a mere wrongful indictment could be expected to cause, by such very act, such fear and intimidation upon other independent witnesses who would give evidence of the offence of murder committed by them. Consequently we are left with the evidence of only family members who stood their ground, whatever may have been the

threat or fear to them.

10. The direct evidence in this case is therefore of only family members. Such evidence has been given by as many as 3 witnesses, P.W.8 to 10. Their evidence therefore, cannot be discarded on the ground that though the offence took place in a public place independent evidence is not before the Court.

11. It will have to be seen whether the oral evidence of these witnesses finds acceptable corroboration in the evidence of other witnesses. These are the Doctor P.W.6 who examined the deceased victim and recorded 3 injuries on her back, the SEM P.W.4, who recorded a separate dying declaration of the deceased victim on 30th September, 1990, Sarpanch P.W.11, the Police Head Constable P.W. 12 who was called by the Doctor on telephone to the primary health center where the deceased was taken for removal of the axe which was rooted in her back and who recorded the FIR/dying declaration, the P.S.I. P.W.14 who drew up the spot panchanama and who was also Investigating Officer in this case.

12. It is contended on behalf of the Appellants that the evidence of the family members cannot be accepted as

they are partisan and unnatural witnesses and inimical to the accused. It is also contended that their evidence is left uncorroborated and hence cannot be accepted. The dying declaration has been challenged on the ground that the scribe has not been examined and that it could not have been recorded initially by the PSI who recorded the FIR. It is also contended that there was delay in filing the complaint which is not explained by the prosecution.

13. The main argument on behalf of the Appellants is that the Appellants lacked the intention to kill the deceased and that they had come to avenge their indictment against her father-in-law Gulab only. It is only because the deceased intervened, the axe blow fell upon her. It is therefore, contended that it was in the nature of an accidental act which resulted in death so that the acts fell within the mischief of Section 304 Part II of the IPC and not 302.

14. It is also argued on their behalf that no motive was established in the absence of any previous enmity between the Appellants and the deceased and in fact the Appellants were only insulted by the wrongful indictment.

15. It is contended on behalf of the prosecution that

the motive for commission of offence was clear. The Appellant no.1 being armed with an axe and the Appellant no.2 with a stick, show themselves to have come with previous intention to cause or commit the murder. The motive for the murder was their wrongful indictment. Independent witnesses could not be examined despite the prosecution attempt because the Appellants/accused created a terror in the village by their behaviour and later threats. It is therefore, contended that though the villagers could not be examined as independent witnesses, the evidence of the family members having stood their ground must be accepted. It is also contended that the case does not rest on the evidence of a sole witness to the incident. The prosecution case is based upon direct evidence of 3 witnesses which are consistent and corroborated by the injuries shown in the medical report and the oral evidence of the Sarpanch and the Doctor. It is further strengthened by the dying declaration initially made orally to the Doctor then recorded by the Head Constable in the FIR and later also given to the SEM, all of which are consistent. It is contended that the deceased had no reason to make an untruthful dying declaration or to falsely implicate the appellants/accused. Similar is the case of the oral evidence as the injured witnesses who would have no

desire to falsely implicate the appellants/accused. The evidence led by the trial Court will have to be examined in that light.

16. The direct oral evidence of P.W. 8, 9 and 10 must be considered first.

17. P.W.8 has deposed about his relations and his relationship with the injured. He knows both the appellants/accused since his childhood as they were the residents of their village living close by. His son's bicycle was stolen a few days before the incident and altercation had occurred between him and the appellants/accused on the point of theft of the bicycle. On the date of the incident he was lying on a cot in his house. His niece Suman told him that both the appellants/accused had arrived near their house with axe and stick. His wife Anusuya, his daughter-in-law Fulabai as well as his brothers' wife Balabai, his son Mahesh and his daughter Surekha were there. The appellants/accused were standing near the water connection opposite his house armed with axe and stick, he was proceeding towards the house of Sarpanch with his wife. The appellants/accused accosted them and would not allow them to go there. Appellant/accused no.2 gave stick blow to his wife

Anusuya. Anusuya fell down. Then he gave a stick blow on Balubai and appellant no.1 came on his own person. Meanwhile his daughter-in-law Fulabai intervened and asked him whey he was being assaulted. At that time appellant no.1 gave axe blow on her back. Fulabai fell down then appellant no.1 gave second axe blow on her back. The axe got rooted in her back. The appellant no.1 dragged Fulabai along with the axe towards the electric pole. People gathered. The Sarpanch was amongst them. Appellants tried to take out the axe. The Sarpanch abused them. The appellants ran away. Fulabai was taken to the Doctor in the Primary Health Center in the Village. The Doctor took out the axe. Thereafter, Fulabai was to be shifted to Civil Hospital, Solapur. She died on the way.

18. This is the eye witness's account of P.W.8 who was also injured. In fact he was the cause of this incident because he had indicted the accused for the theft of the bicycle.

19. In his cross examination aside from putting a case of denial with regard to the incident, nothing further is mentioned. He has been asked about unrelated items relating to the bicycle, whether Fulabai had intervened, whether he intervened and made hue and cry and what

happened to Fulabai on her way to the hospital. The eye witness account has accordingly remained undisputed.

20. P.W.9 is his niece who had come to report about the arrival of the accused near the house of P.W.8. She has deposed that she also knew the accused since her childhood as they were living near by. On the date of the incident the accused picked up quarrel with P.W.8. She has also deposed that the appellant no.1 was armed with an axe and appellant no.2 with a stick. They asked Balubai (P.W.10) where P.W.8 was. They went near his house. P.W.8 and his wife Anusuya wanted to inform the Sarpanch. At that time the accused came and gave stick blows to his wife, who fell down, as also to Balubai. Then Appellant no.1 came ahead to assault Gulab. The deceased victim Fulabai, his daughter-in-law, arrived there. The appellant no.1/ accused gave an axe blow to Fulabai on her back. She deposed that appellant no.1 gave two axe blows to Fulabai. When the second was given, it rooted in her back. Both the appellants/accused dragged Fulabai along with the axe towards the electric pole. Villagers including Sarpanch arrived. The Sarpanch abused the accused. The accused ran away. Then Fulabai and Aunusuya were taken to the hospital, she went with

Fulabai. The axe was lying embedded in her back. Fulabai was first admitted to the local hospital and then taken to Civil hospital, Solapur. She died. Hence, her body was taken back.

21. This eye witness account is consistent in all material particulars with the account of P.W.8. Even in her cross- examination, aside from the case of denial with regard to the incident nothing material is brought out.

22. Balubai, the other daughter-in-law of P.W.8 is examined as P.W.10. She has deposed that she knows both the accused. She has also deposed about the theft of the bicycle. She has deposed about how all were at the time of the incident when the appellants/accused arrived with axe and stick and inquired about Mohan, her husband and then went towards the house of P.W.8. She has also deposed about the fact that Suman woke-up p.w.8 and his wife Aunusuya. They came out of the house and were passing to go to the house of Sarpanch, mean while both the accused arrived and abused them. Anusuya asked them not to abuse, upon which appellant no.2 gave stick blow to her. She became un-conscious. He also gave a stick blow to the witness herself as well as to her husband

Mohan, who snatched the stick from him. The appellant no.1 went ahead to assault P.W.8. At that time the deceased victim intervened and appellant no.1 asked her why she intervened and gave her the axe blow on her back. She fell down. Again appellant no.1 wielded another axe blow on her back. The axe got rooted into her back. Both the appellants/accused dragged her by holding the handle of axe up to the electric pole. Others arrived including the Sarpanch. Sarpanch abused the appellants and the appellants ran away. Anusuya as well as Fulabai were taken to the hospital. This witness did not go along with them. The dead body of Fulabai was brought to the village.

23. This eye witness account is also consistent with the other two accounts, without any material cross-examination.

24. The evidence of these 3 witnesses has brought out the incident in vivid detail. It shows that the accused had come prepared with deadly weapons to assault P.W.8 who has indicted them of theft. They were talking in abusive language before the incident. They met the Sarpanch to complain. They inquired about his whereabouts. Since P.W.8 was informed of the fact of their arrival he wanted to go to the Sarpanch with his

wife. It must be remembered that the Sarpanch had even earlier taken some part in the incident relating to the theft of the bicycle and had pacified the appellants. Under this circumstances the arrival of the appellants near the house of P.W.8 justified p.w.8 to come out of the house to go to the house of Sarpanch. He was accosted by the accused on the way. The appellant no.1 was about to give axe blow on him, his daughter-in-law arrived and inquired from him why that was so. Upon this Appellant no.1 got enraged, asked her why she intervened and she was given the axe blow instead. It will have to be seen whether this part of the incident has been correctly brought out by the 3 witnesses, and if that was so whether giving the axe blow to the deceased victim instead of p.w.8 would bring the act of the appellant no.1 squarely within Section 302 of I.P.C.

25. Three persons have accounted for the same incident from three angles. The deceased Fulabai inquired only with P.W.8. P.W.8 has mentioned about what she questioned. It is pertinent to note that P.W.10 has not stated anything about that question because she was on the other side of the road in front of her house. Similarly P.W.9 who saw the incident from another angle has not mentioned about this question. Similarly only P.W.10 has deposed about the

question put to her by the Appellant/accused about where her husband Mohan was. She was near her house. Hence, she has deposed about that fact which other witnesses, a little further away, have naturally not deposed about. This brings out the same incident deposed by three witnesses clearly without any embellishment on the part of any of them.

26. The evidence of the Sarpanch who arrived soon thereafter upon the resultant commotion is to be considered along with this evidence. He is examined as P.W.11. He has deposed about both the accused having gone to him on the date of the incident and reported to him how they were indicted for committing the theft of bicycle.

27. The Sarpanch pacified them and assured them that he will consider that matter next morning. The accused went towards the house of P.W.8. Half an hour thereafter he heard a commotion and went to the open space of his house. He saw Fulabai lying on the land near the electric pole. Other villagers had collected there. The axe was rooted in her back. Fulabai was taken by jeep to the hospital. Both the accused were present near Fulabai at that time. He abused the accused. Then they went home. This direct oral

evidence completely corroborates the evidence of the eye witnesses who are also injured witnesses. Though the actual incident is not seen by the Sarpanch, his deposition about what transpired before the incident shows the motive for the offence. His deposition about what transpired after the incident is, in all material particulars, the same as that of the parties present during the incident. He has deposed about the fact of coming to the scene of the offence and abusing the Appellants as has all the eye witnesses.

28. The evidence of P.W.8,9,10 and 11 read together makes a completely credible story and shows beyond doubt what transpired.

29. The deceased victim as well as the other injured witnesses were taken to the local hospital. Dr. More who was on duty of the local hospital has been examined as P.W.6. He has deposed that on the date of the incident i.e. On 30th September, 1990 when he was on duty the victim was admitted in the Primary Health Center where he worked. He examined her and noted three injuries, an incised wound over the right scapula, another incised wound into the plural cavity and the incised wound over at the back which were caused by a sharp and cutting instrument. All the wounds were

grievous. He recorded it in the case papers which is produced at Exhibit-45. The patient was conscious. She gave the history of assault by an axe. The axe was rooted in her back. The Doctor himself took it out and handed it over to the police. It is in these circumstances that the weapon used in the offence has been seized by the police.

30. He has further deposed that the police recorded her statement, has been treated as FIR, at which time she was conscious. He endorsed the statement so recorded. Thereafter Honorary Magistrate was called. The patient was conscious and so certified by him. The Magistrate recorded her statement in the presence of the Doctor. The Doctor endorsed the statement which endorsement he identified on Exhibit-41. That was the copy of the statement recorded by the Magistrate.

31. He deposed that the wound could be caused by an axe. In fact the weapon causing the wound was right at the place of injury in this case. He has naturally not identified the axe. He is not expected to.

32. The other three witnesses P.W.8, 10 and her husband Mohan were also brought to the Primary Health Center. He recorded their injuries. These were

reduced as separate certificates Exhibits 48, 49 and 50 showing simple injuries made by a blunt object like the stick. His cross examination has yielded nothing for the accused.

33. The Honorary Magistrate who recorded the dying declaration of the deceased victim has been examined as P.W.4. He has stated that he received yadi from the police on 30th September, 1990 and went to the hospital and patient was conscious and so certified by Dr. More P.W.6. He put questions, recorded her statement, read it over to her, obtained her thumb impression thereon, and put his signature as well as stamp upon the same. He produced that document at Exhibit-40. He recorded this statement in two parts and retained one part with him. On that retained part he obtained the endorsement of the Doctor. That part has been produced at Exhibit-41 on which the endorsement has been identified by the Doctor P.W.6 as being in his hand writing.

34. The statements of the three injured witnesses which records the direct oral evidence of the incident is corroborated by the actual injury upon the deceased victim as also lesser injuries upon the other witnesses, who were present at the time of the incident. It is

further corroborated by the evidence of the Sarpanch relating to the motive of the crime and what happened after the incident. It is again corroborated by the evidence of the Doctor showing the medical history given by the patient and taking out the actual weapon of the offence and handing it over to the police. The dying declaration of the victim is separately recorded by the independent witness, the Honorary Magistrate. Nothing further is required to be shown by the prosecution. The case is proved beyond any doubt, the evidence of other witnesses who turned hostile, not withstanding.

35. It is strongly urged by the Advocate Mr. Bansode on behalf of the appellants that this case falls within the meaning of Section 304 II of the IPC and not under Section 302 IPC. He has relied upon the case of Devidas @ Chinya Harischandra Mahale Vs. State of Maharashtra, 2004 ALL MR (Cri.) 1018. It was the case of stabbing the deceased and injuring the complainant. In that case both the complainant and the deceased had gone to the accused to demand an explanation regarding an earlier quarrel on the issue of eve teasing of the complainant. The accused drew a knife and stabbed the deceased and injured the complainant. It was urged that he did not intentionally kill the

deceased, though he must be taken to have knowledge that his act was likely to cause the death of the deceased. Paragraph 2 of that judgment which shows the facts of the case specifically shows that the accused took out the knife and stabbed once on the stomach of the deceased. When the complainant rushed to intervene the accused assaulted him with a knife. That case therefore, stands on completely different footing. It cannot help appellant no.1 who, in this case has stabbed the deceased victim twice, the second hurt being more grievous than the first resulting in the weapon being embedded in her back and remaining there despite she being dragged to the electric pole and despite the accused trying to remove the weapon and until she was taken to the Primary Health Center.

36. The other judgment relied upon by the Advocate for the Appellants is in the case of Rakesh Syamsundar Sharma Vs. State of Maharashtra, 2004 ALL MR (Cri.) 2931 and Indersen @ Vakil Ramsurat Yadav Vs. State of Maharashtra , 2004 ALL MR (Cri.) 3359 in which also there was one stab injury from the heat of moment and heat of anger created by that moment while accosting the accused persons. Both these are cases of a single stab injury.

37. The Advocate for the appellants has drawn our attention to the case of Dayaram @ Jayaram Parshuram Pawar Vs. State of Maharashtra, 1996(4) ALL MR, 449 in which there were two knife blows inflicted upon the deceased after a scuffle. The injuries were not fatal per se. The conviction under Section 302 was changed to conviction under Section 304 II, in that case both the injuries showed a wound on the cheek and the other wound below and parallel to the right clavicle on the chest wall with a sharp edged weapon. The injuries were stitched and two bottles of I.V fluid were administered to the victim. The victim succumbed to his injuries after about three hours. A careful reading of the judgment shows that both these blows causing injuries were inflicted upon the spur of a moment. None was inflicted with such vileness that the weapon got embedded in the body such that it could not even be easily removed. Therefore, the case cannot stand on the same footing.

38. It would have to be seen whether deceased Fulabai received the axe blow by way of an accident merely because she came in the way of appellant no.1 whilst he wanted to wield the blow upon P.W.8. The fact remains that he gave two clear blows with axe on the back of Fulabai. Since Fulabai inquired with P.W.8 she

was facing P.W.8. She was therefore, backing the appellant no.1. Hence, the axe blow fell on her back. Had it been only one axe blow, it could have been termed as an accidental blow under sudden provocation. That was not so. She was given the second blow. All the three witnesses have mentioned about the second blow. The axe got rooted in her back. It could get rooted only on the last blow. Hence, that was the second blow. The rooting of the axe shows the considerable force with which the blow was dealt. The evidence of the witnesses show that the appellants tried to remove the axe from her back but could not. It was therefore, so deeply rooted. In fact this act shows that they wanted to flee with it and cause disappearance of the evidence of the use of the weapon itself. Because that could not be achieved, they dragged her along with the axe to the electric pole.

39. The fact that the appellant no.1 gave, not one, but two axe blows, the second one harder than the first shoddily and roughly handled the victim by dragging her with the axe and tried to pull out the axe but failed in the attempt, shows not only the knowledge that such fiendish would result in death, but that he had the vile intention to cause death. The entire act constituting 2 axe blows by Appellant No.1 and dragging her and

trying to take out the weapon show the unmistakable offence of murder being committed by him.

40. However, so far as Accused No.2 is concerned, the counsel for the accused contended that this accused had only a stick with him and he has not inflicted any blow on the victim with that stick. He further contended that he has not caused any injury to the victim and, therefore, he has to be acquitted of the charges levelled against him under Section 302 of the Indian Penal Code. The record of the case and the evidence of the eye witnesses show that when an axe used by Accused no.1 got rooted in the back of the victim, the Accused Nos.1 and 2 dragged the victim with the help of that axe. This act of Accused No.2 amounts to causing hurt, because the victim was already hurt by pulling her with the axe though along with Accused No.1, the Accused No.2 aggrevated the hurt to her. Therefore, though Accused No.2 is entitled for acquittal of the charges under Section 302 of the Indian Penal Code, but is liable to be convicted under Section 324 of the Indian Penal Code.

41. In the circumstances the conviction of appellant/ accused No.1 under Section 302 of IPC is maintained. His Appeal is dismissed. The conviction of

appellant/accused No.2 for the offence under Section 302 cannot be maintained. His conviction for the offence under Section 324 of IPC is maintained.

42. The Appellant no.1 Sampat Ramu Patole has been in custody. He shall serve out his sentence as per the impugned judgment of the learned II Additional Sessions Judge, Pandharpur.

43. So far as appellant/accused No.2 is concerned, his conviction under Section 302 of IPC is set aside. His conviction under Section 324 of IPC is maintained. He is sentenced to suffer RI for 3 years and to pay fine of Rs.10,000/- and in default to suffer RI for 6 months.

44. Appellant/accused No.2 is on bail. He shall surrender within 4 weeks from today to the trial Court for undergoing the remaining sentence after set off is given for the period already undergone. If he does not surrender within 4 weeks the trial Court shall take him in custody.

(SMT.ROSHAN DALVI, J.) **(SHRI. D.G.DESHPANDE, J.)**